United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1078

To be argued by
LAWRENCE B. PEDOWITZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1078

UNITED STATES OF AMERICA,
Appellee,

—v.—

BRYAN CANNIFF and JOHN BENIGNO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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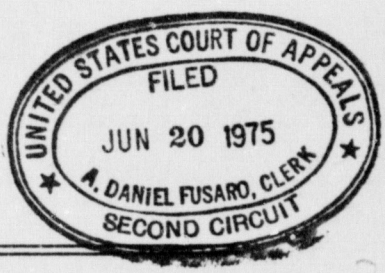

3

TABLE OF CONTENTS

PAGE

Table of Cases

PAGE

OTHER AUTHORITIES CITED

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Bryan Canniff and John Benigno appeal from judgments of conviction entered on March 14, 1975, after a four day jury trial before the Honorable Lee P. Gagliardi, United States District Judge.

Indictment 74 Cr. 944, filed on October 7, 1974, charged Canniff and Benigno in Count One with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846. Count Two charged both defendants with distributing 34 grams of cocaine on October 17, 1973, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Three charged both defendants with possessing with intent to distribute approximately 27.91 grams of cocaine on October 17, 1973, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on January 9, 1975 and concluded on January 14, when the jury found both defendants guilty on all three counts of the indictment.

On March 14, 1975, Judge Gagliardi sentenced Canniff to concurrent terms of imprisonment of one year and one day on each of the three counts, to be followed by a special parole term of three years. Benigno was sentenced to concurrent terms of imprisonment of twenty-seven months on each of the three counts, to be followed by a three year special parole term.

Both Canniff and Benigno are free on bail pending this appeal.

Statement of Facts

The Government's Case

The proof at trial focused upon two meetings between Bryan Canniff, John Benigno and Daniel Miller, a government informant—one in early October 1973 and one on October 12, 1973—and on the events of October 17, 1973, during which Bryan Canniff distributed cocaine to undercover agents that he had obtained from John Benigno.

A. Pre-October 1973

Daniel Miller first met Bryan Canniff in January, 1973. After their first meeting, they continued to meet regularly in a neighborhood bar and began working together in a narcotics distribution business. Between February and August 1973, Miller made between 50 to 100 sales to Canniff of cocaine, marijuana, hashish, LSD and peyote. Miller occasionally accompanied Canniff while Canniff sold these drugs to others, but most often Miller simply provided Canniff with the drugs and Canniff would return to Miller with the money. During the time Canniff and Miller were

in partnership, Miller saw Canniff use cocaine, marijuana and hashish on many occasions. (Tr. 84-88, 148).

After attempting to import cocaine into the United States from Colombia, Miller was arrested in Miami, Florida on August 1, 1973.* Miller then agreed to become a government informant. (Tr. 88-97).

B. Early October 1973

In late September or early October, 1973, Canniff approached Miller and told him he could obtain quantities of cocaine for sale. (Tr. 113). In the first week of October, Canniff brought John Benigno to Miller's apartment at 7th Avenue and Bedford Street. Miller was introduced to Benigno, who told Miller that he was regularly in contact with reliable suppliers of cocaine who could supply a good quality product. Benigno produced a sample of cocaine which Miller tested. (Tr. 89-90, 138-39).

C. October 12, 1973

Canniff and Benigno returned to Miller's apartment on the afternoon of October 12, 1973. At the time, Benigno had 2 ounces of cocaine with him which he said he wanted to sell. Miller told Benigno that "his people" wanted to buy a larger amount—4 to 6 ounces—but agreed to telephone them to let Benigno negotiate. Miller then called Special Agent Jeffrey Hall of the Drug Enforcement Administration and said that Bryan Canniff and "John" were in his apartment and that "John" had 2 ounces of cocaine to sell. Agent Hall then spoke over the telephone to Benigno, who argued that Hall ought to purchase the 2 ounces of

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* Miller was indicted in United States District Court in Miami and his case was transferred to the Southern District of New York. After pleading guilty to importing cocaine into the United States, Miller was sentenced by Judge Tenney in April, 1974, to 3 years' probation.

cocaine immediately, but Hall told him he wanted to wait until he could supply a larger quantity. After Benigno and Hall hung up, Benigno insisted that Canniff pay his car fare for bringing him all the way to Miller's apartment for nothing. (Tr. 90-93, 170-73).*

D. October 17, 1973

After this meeting on October 12th, Canniff and Miller spoke to each other on the phone a number of times about a cocaine sale. On October 17, 1974, Canniff called Miller and said that "John" had 5 ounces of cocaine for sale at about $700 to $750 per ounce. Miller then contacted Hall, who agreed to arrange an undercover purchase that day, and Miller returned the call to Canniff. Miller told Canniff to come to his apartment and pick him up, because they were going to meet Miller's friends. (Tr. 94-95). Canniff then drove to Miller's apartment, and the two men headed uptown. (Tr. 95).

Meanwhile, at approximately 4:00 p.m., Special Agents Joseph Sullivan and Edward Magnuson of the Drug Enforcement Administration had gone to Friday's Restaurant at 1152 First Avenue in Manhattan. Fifteen minutes later, Canniff and Miller entered the restaurant, and Miller introduced Canniff to the agents. Canniff told the agents that he had 5 ounces of cocaine for sale for about $3,500 and assured the agents that he always dealt in good quality cocaine. Agent Sullivan expressed an interest in the 5 ounces but told Canniff he wanted a more definite price. Canniff replied that he would have to check with "his man" about the final price and then asked to see Sullivan's money. Canniff and Sullivan then walked into the bathroom, where

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* Agent Hall later testified that when he arrested Benigno he had an opportunity to speak to him and that he recognized Benigno's voice as being the same as the voice of the man he was introduced to as "John" on October 12, 1973. (Tr. 197).

Agent Sullivan showed Canniff $3,600 in cash. (Tr. 35-37, 160).

After seeing the money, Canniff told Sullivan that he would go to his man John's apartment and return to Friday's with John and the 5 ounces. Canniff and Sullivan then walked out of the restaurant to Canniff's motorcycle. Before getting onto the motorcycle, Canniff pulled from his wallet a tinfoil packet which he said was a sample of the same quality cocaine that Sullivan was later to purchase. (Tr. 38-39; GX 1).

Canniff was then followed by Special Agent Jeffrey Hall and other surveillance agents as he rode his motorcycle to and entered an apartment building at 525 E. 81st St. Shortly after going inside, Canniff came out of the building alone, got back on his motorcycle, and returned to Friday's. (Tr. 160-62).

At the restaurant Canniff told the agents that John did not want to meet any customers and that he wanted the money advanced before the 5 ounces were produced. The agents refused. Canniff then offered to call his man to see what he had to say. After making a call, Canniff returned to the agents and said that John still refused to meet anyone and that he continued to want the money advanced. Agent Sullivan again refused, and Canniff agreed to make a second call. (Tr. 39-41).

This time Canniff returned to say that John had agreed to advance one ounce of cocaine at a time if the agents would meet Canniff at 81st St. between York and First Avenues in about 15 minutes. The agents agreed to this proposal, whereupon Canniff left the restaurant with Miller. They got onto Canniff's motorcycle and drove to 525 E. 81st St. There, both Canniff and Miller entered an apartment building.

While in the lobby of the building, Canniff buzzed up to apartment 4E and left Miller downstairs. Miller then

walked out of the building and told Agent Hall that Canniff had gone up to apartment 4E. Miller then walked over to Agent Sullivan's and Magnuson's vehicle which was parked on 81st St. and told them Canniff would soon arrive with the package. Agents Sullivan and Magnuson had in the meantime arranged with Agent Hall that they would not buy the 1 ounce package they were expecting Canniff to deliver. Instead, they would refuse the package, thereby permitting Agent Hall to arrest Canniff as he got out of the undercover car to return to the apartment. (Tr. 41-45, 76, 119, 162-63).

Shortly after Miller had walked over to the undercover car, Canniff arrived with the package. He got into the car and handed Agent Sullivan a clear plastic bag containing cocaine, saying that this was the first ounce, that it would cost $750, and that it was good quality. Sullivan then complained that the price was high and that the cocaine did not appear to be high quality. Canniff replied that it was indeed good quality and that it was worth the price. Sullivan then said he had decided not to buy the package and asked Canniff to get out of his car. Canniff did as he was requested, and, as he started walking back to the apartment building, he was arrested by Agent Hall. (Tr. 45-47, 163-65).

Hall immediately advised Canniff of his constitutional rights, searched him, and found the package of cocaine which had just been offered to the agents. Canniff told Hall that he had gotten the package of cocaine from a man named John who was waiting in apartment 4E at 525 E. 81st Street for him to return with the money. He also told Hall that John was approximately 5'8" tall, very thin, with long brown hair, and wearing a flowered shirt and that John was the only person in the apartment. (Tr. 165-67, 202; GX 2).

Hall, together with other narcotics agents, then entered the apartment building at 525 E. 81st St. Hall spoke briefly

to the superintendent of building who agreed to assist the agents in gaining entry to apartment 4E. The agents then went with the superintendent to the doorway of apartment 4E, where the superintendent knocked on the door. The defendant John Benigno, who Agent Hall found to fit the description of "John" provided by Canniff—5 feet 9 inches tall, very thin, with shoulder length hair and wearing a flowered shirt—opened the door. The officers, displaying their badges, identified themselves as federal agents. Benigno then attempted to slam the door, but Agent Hall managed to get part of his body into the doorway and force the door open. Inside the apartment, the agents found a young woman sitting in front of a table. On the table were three aluminum packages, one of which was open, containing cocaine. After speaking to Benigno after his arrest, Agent Hall concluded that Benigno's voice was the same as that of the man he had spoken to on the phone on October 12, 1973. (Tr. 48-51, 167-70, 197; GX 3).

The Government's chemist testified that he believed that the cocaine contained in the three aluminum packages found in apartment 4E came from the same batch of cocaine as the sample and 1 ounce package which Canniff had earlier that day offered to the agents. (Tr. 237).

The Defense Case

A. Bryan Canniff

Canniff called two character witnesses who testified that they had never heard anything bad about his reputation for truthfulness and honesty. On cross-examination, however, both witnesses admitted that they had not heard that Canniff had pleaded guilty to burglary in the State of Minnesota in 1967. (Tr. 216, 218, 220-21, 223).

Canniff also called Ron Smerechniak as a witness. He testified that in September and October, 1973, he had been a regular customer at the Broome Street Bar and had seen

Daniel Miller buy drinks for Bryan Canniff on two or three occasions. He also testified that he considered Miller to be prone to violence. (Tr. 339e, 339g).

Canniff took the stand in his own defense. He stated on direct examination that he had never used drugs, that Daniel Miller never sold him drugs, and that he never conspired to distribute drugs. (Tr. 266-67).

He stated that sometime after August 2, 1973, Miller had given him concert tickets, bought food and drinks for him, given him furniture and offered to buy a car for him.* He also testified that in September, 1973, Miller asked him if he knew someone who had cocaine for sale. Canniff claimed that he repeatedly told Miller that he did not. Then, Canniff stated, in mid-October 1973 he was introduced through his roommate to a friend ** who said he knew someone that had cocaine for sale. This person supplied a phone number for the seller, and Canniff in turn gave the phone number to Miller. (Tr. 267-70).

According to Canniff, a few weeks then passed and Miller asked him if he was willing to visit the person whose phone number he had supplied. Canniff said he refused this request twice in the same day. Canniff further testified that the next day, October 17, 1973, Miller called him about 11 A.M. and said he was in need of plane fare to see a mutual friend on the West Coast and asked him if he would help in setting up a cocaine sale that afternoon. According to Canniff, Miller told him that the seller was unwilling to deal with Miller, because they had recently had a falling out, and that Canniff was therefore needed to arrange the deal. Canniff stated that he agreed to go to Miller's apartment,

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* Canniff also testified that he learned in September—a month before his sale of cocaine to the agents—that the check for the car had bounced.

** Canniff later testified on cross-examination that "this friend" was his co-defendant John Benigno—a rather remarkable omission.

and when he arrived, Miller offered him $1,000 to do him this favor and also offered him champagne.

Canniff testified that he then agreed to participate and Miller gave him the sample of cocaine which he later gave to the agents. (Tr. 271-72).

Canniff then testified that the agents' testimony about the remainder of the events of October 17th was substantially correct (Tr. 272-73), but went on to recite facts which were at significant variance with the agents' testimony. Canniff stated for example, that at one point during the afternoon of October 17th he had told Miller, in the presence of one of the agents, that he did not want to go through with the deal and that Miller had then threatened to kill him if he did not complete the deal. (Tr. 273-75).

He also testified that, on his first trip to apartment 4E after meeting the agents in Friday's, he had found John Benigno in the apartment. Benigno, according to Canniff, told him that Juan Aponte, who was dealing in cocaine, was not there but would be back shortly. Canniff said he then explained the "situation" to Benigno. (Tr. 275-78).

Canniff then testified, again in direct conflict with the agents, that he returned to Friday's and told the agents that the transaction would not take place and that he did not want to get involved. At this point, according to Canniff, Miller bought Canniff a few more drinks which put him at ease. He then agreed to call the seller to see if the deal could be done 1 ounce at a time. (Tr. 276).

Canniff testified that he then called the apartment and spoke to John Aponte who agreed to sell the cocaine 1 ounce at a time. He then drove to 81st St. with Miller and left Miller in the lobby as he went upstairs. When he arrived at apartment 4E, he testified, he knocked on the door and said, through the door, that he was there to pick up the

package. Some 30 seconds passed, and the door opened slightly. The package, according to Canniff, was slipped out to him. *Canniff testified that he did not go into the apartment and did not know who was inside.* (Tr. 276-77).

Canniff then testified that he got into the car with the agents and that, when he handed them the package, they refused to purchase it. He stated that he then got out of the car and was placed under arrest. (Tr. 278-79). Since he did not know the people in the apartment, Canniff maintained, he agreed to cooperate with the agents and told them it was John's apartment and described John Benigno. (Tr. 279, 284).

Canniff categorically denied that he had ever met John Aponte or that he had ever been in Miller's apartment on October 12th. (Tr. 281).

On cross-examination, Canniff told a story that was both illogical and glaringly inconsistent. He had began his direct testimony by stating that he had never used drugs. On cross-examination he admitted that he had "tried" marijuana and cocaine. (Tr. 288-89, 303).

On direct examination, Canniff had denied ever having met John Aponte, the supposed source of the cocaine. Under questioning by the Assistant United States Attorney, Canniff testified first that he only knew Aponte was the source of the cocaine because John Benigno told him this in West Street after they were arrested. (Tr. 318). He then reiterated that he had never seen John Aponte. (Tr. 325). Under further questioning, however, he testified that when he had gone to the door of apartment 4E to pick up the package, a Puerto Rican male with a mustache had handed him the bag of white powder. He also stated that this man was taller than 5 feet 9 inches, was not thin, was wearing a flowered shirt, and did not look like John Benigno. (Tr. 345-46).

Canniff had testified on direct examination that, after his arrest, he had described only John Benigno to the agents. On cross-examination, Canniff testified first that he only assumed Aponte was in the apartment, since he had not seen him, but had told the agents about two Johns. (Tr. 296). After changing his story to say that he had seen a Puerto Rican male in the apartment when he picked up the package, Canniff testified, in succession, that after his arrest: (1) he told the agents that John Benigno was in the apartment, had described him and had also told them that another person handed him the cocaine through the door (Tr. 352); (2) he told the agents only about one John (Tr. 354); (3) he gave a description of John Aponte to the agents (Tr. 354); and (4) he told the agents about two Johns in the apartment. (Tr. 356, 363). Canniff then admitted that, after the arrest of Benigno, and while in DEA Headquarters, he had told the agents that John Benigno was the source of the cocaine. He testified that he had done this because it simply did not make any difference to him at the time. (Tr. 357).

Canniff also testified on direct examination that the agents had been substantially accurate in testifying about the events of October 17th. On cross-examination, Canniff contradicted the agents' testimony in vital respects. Canniff testified that Miller had done most of the talking when they spoke to the agents in Friday's (Tr. 307); that Miller suggested that the agents show Canniff their money (Tr. 308); that Miller told Canniff to give Agent Sullivan a sample of the cocaine (Tr. 314); that, upon returning from 525 E. 81st St. to Friday's, Canniff told the agents that the seller was not there and the deal could not go forward (Tr. 319); *

* On the very same page of the transcript, after testifying that he told the agents the seller was not there, Canniff testified that, upon his return, he told the agents that John wanted the money fronted. (Tr. 319).

that, after the agents refused to advance the money, he met outside the bar with Miller, who threatened him (Tr. 322, 350); that, when the agents refused to buy the cocaine, he told them that he really did not want the deal to go through anyway (Tr. 349); and that he told the agents about a Puerto Rican in apartment 4E. (Tr. 350).

Canniff also testified that, when he made his first trip to apartment 4E, he was going there *to negotiate a cocaine deal.* (Tr. 341). He further maintained that during this first trip he had not met John Aponte— the alleged seller— but only John Benigno. Yet he testified that when he spoke to John Aponte for the first time on the phone after returning to Friday's, Aponte told him that "the stuff is here as it was *arranged to be*" (Tr. 323), and that he had told Aponte that the buyers were unwilling to follow the "*original arrangement* of fronting the money for the cocaine." (Tr. 330).*

Canniff stated that, when he spoke to John Aponte on the phone, Aponte had a Puerto Rican accent. (Tr. 325, 326).

Canniff also asserted that, although Benigno had previously supplied him with John Aponte's phone number when he had expressed an interest in locating a cocaine dealer, and although Benigno was in apartment 4E when Canniff first arrived looking for a package (Tr. 329, 334), Benigno did not know what was going on that day. (Tr. 337).

B. John Benigno

Benigno took the stand and testified that he had never: (1) seen Daniel Miller before Miller took the stand and

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* Canniff later testified that he had never spoken to Aponte about "original arrangements." (Tr. 332).

testified against him; (2) gone to Miller's apartment; (3) spoken to Agent Hall over the phone about a sale of cocaine; (4) talked to Bryan Canniff about the sale of cocaine; (5) given Canniff cocaine to sell; or (6) been convicted of a crime. (Tr. 370-73).

He stated that he had been doing carpentry work in John Aponte's apartment on the afternoon of October 17, 1973 and that, when the bell rang and he looked through the peephole, he saw the superintendent who told him some friends had left him a message. When he opened the door, the agents broke in and arrested him. He further testified that the tinfoil packets on the table in the apartment did not belong to him. (Tr. 373-79).

On cross-examination Benigno denied ever having been convicted as a youthful offender in New York or having used cocaine, but admitted to using marijuana on numerous occasions. (Tr. 380-81, 386, 413). He also admitted having supplied Canniff with John Aponte's phone number when he had been asked if he knew someone who dealt in cocaine. He further admitted having been in apartment 4E on October 17, 1973 when Canniff first came to the apartment and also when the agents arrived. (Tr. 384, 386, 434). He testified that he had never had a conversation with Canniff about narcotics, but admitted telling Canniff on October 17th that John Aponte was a drug dealer and would return to the apartment shortly. (Tr. 381-83).

Benigno also testified that shortly after the agents had arrested him they began asking where "Aponte" was. (Tr. 416). Although Canniff had testified that he first learned Aponte's name when Benigno had mentioned it to him at West Street after their arrests, Benigno stated that he had not spoken to Canniff at West Street. (Tr. 417).

Benigno further testified that John Aponte looked like Olympic swimmer Mark Spitz—brown hair, mustache, close to 6 feet tall. (Tr. 430). He also stated that Aponte had a slight Puerto Rican accent. (Tr. 432).

Benigno also testified that, when Canniff had arrived at apartment 4E on October 17th, he asked Benigno if he had "the thing" for him,* but that, although Benigno had supplied Canniff with Aponte's phone number and knew Canniff, he had not bothered to contemplate what "the thing" was. (Tr. 436, 440).

Benigno denied slamming the door on the agents as they entered the apartment, but admitted knowing that there was cocaine in the apartment. (Tr. 448-49).

The Government's Rebuttal Case

In rebuttal, Special Agent Jeffrey Hall testified that, in early October, Daniel Miller had supplied him with a physical description of the man who had been introduced to him by Bryan Canniff as "John." Although Benigno had testified that he had never met or seen Daniel Miller before he saw him in the courtroom, Hall testified that he had incorporated Miller's description of John in a report prepared on October 10, 1973—one week before Benigno was arrested in apartment 4E—and that Miller had described "John" as Italian, in his 20's, thin, with long dark hair. And while Benigno and Canniff had testified that John Aponte had a Puerto Rican accent, Hall testified that the man he had spoken to on the phone on October 12, 1973 did not have an accent. Hall further testified that, when Bryan Canniff was arrested, he described only one man named John and had made no mention of a Puerto Rican male. (Tr. 456-66).

Special Agent Edward Magnuson testified that he had been working undercover with Agent Sullivan on October 17, 1973. Magnuson testified that Bryan Canniff had never expressed reluctance about completing the sale and that there had not been a conversation outside the restaurant in which Miller threatened Canniff. (Tr. 475-76, 482).

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* This was inconsistent with Canniff's testimony that when he arrived at apartment 4E for the first time on October 17th, he was there *to negotiate* a sale.

ARGUMENT

POINT I

The conduct of the prosecutor did not deprive Canniff of a fair trial.

Canniff argues that the Assistant United States Attorney engaged in numerous instances of misconduct during the Government's opening, summation and cross-examination, thereby depriving him of a fair trial. This argument is as meritless as it is broad-based.

The overwhelming majority of arguments constructed by Canniff are the product of lifting out of their proper context sentences, phrases and words from the record. Where minor errors were committed by the prosecutor, they have been acknowledged. These errors, however, did not deprive Canniff of a fair trial.

A. The Government's Opening Statement.

The excerpts of the opening statement quoted in Canniff's brief (Brief at 16-17) and attacked as improper were not. The references to Canniff as "a prudent dealer" in cocaine who was "undaunted" by the agents' initial reluctance to purchase the cocaine are phrases lifted out of sentences and paragraphs which portray fully and accurately what the evidence would prove. Even out of context, they establish nothing improper.

While Canniff argues that "[t]hroughout" the opening (Brief at 16), the Assistant United States Attorney expressed his personal opinion in the guilt of the defendants, this is patently inaccurate. After carefully detailing for six pages the testimony the Government intended to present to the jury, the prosecutor stated:

> "Ladies and gentlemen, when you hear the evidence, when you hear all the evidence presented by the government's witnesses, we are confident that you will find guilt beyond a reasonable doubt of both defendants." * (Tr. 25)

This plainly was not an improper expression of personal belief in the guilt of the defendants. See *United States* v. *Meisch*, 370 F.2d 768, 773, 777 (3d Cir. 1966). There was no intimation here that the statement was based on anything but the evidence expected to be adduced, nor was there any indication that the statement was based on some type of expertise which the jurors lacked. Rather, Canniff seems to maintain that each time an Assistant United States Attorney expresses, on behalf of the Government, confidence that the evidence will demonstrate the guilt of a defendant beyond a reasonable doubt he is expressing a personal opinion. Even if this claim were factually accurate, it overlooks the fact that an Assistant United States Attorney should always be personally convinced of the guilt of a defendant before he begins a trial, *DiCarlo* v. *United States*, 6 F.2d 364, 368 (2d Cir. 1925) (L. Hand, *J.*), and, as an advocate, may hardly be criticized for suggesting to the jury that, when the evidence is in, the Government will have proved its case. See *United States* v. *Sawyer*, 347 F.2d 372, 373 & n.1 (4th Cir. 1965) (Sobeloff, *C.J.*).

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* On page 44 of Canniff's brief, this statement is misquoted as:

> "We [the prosecutor and the Government] are confident that you will find guilt beyond a reasonable doubt of both defendants."

The omission of the first half of the sentence, plus the addition of counsel's interpretation of the word "we", convey a false impression that the prosecutor was expressing a personal opinion not based on the evidence to be presented. Canniff's counsel, not content with placing interpretations on isolated phrases out of context that they simply do not have, apparently finds it necessary to add words when omissions and takings out of context will not suffice to make his point.

Also objected to is the prosecutor's statement that

> "If that defense [entrapment] is raised the government is prepared to prove to your satisfaction, beyond a reasonable doubt, that Bryan Canniff was ready, willing, able, indeed eager, to commit the offenses for which he is charged in counts 1, 2 and 3 of the indictment." (Tr. 25).*

This statement is clearly not, as Canniff claims (Brief at 44), an improper urging of "the jury to accept [the Assistant's] expert opinion as to the sufficiency of the evidence rather than making this determination themselves, as was their duty." This statement simply advised the jury of what the Government would be required to prove if entrapment were raised and expressed the *Government's position* that the entrapment defense would be rebutted by the evidence. Moreover, the claim that the Assistant urged the jury to decide this case on anything but the evidence is flatly contradicted by the fact that the Assistant United States Attorney concluded his opening statement as follows:

> "Please pay careful attention to all of the witnesses. Remember that the defendant is entitled to—both defendants are entitled to their presumption of innocence. Judge Gagliardi has asked you, wait until all the evidence is in before you make a judgment about the guilt or innocence of the defendants. Remember that the government is required to prove their guilt beyond a reasonable doubt, and I thank you for your attention." (Tr. 26).

Canniff claims further that the impropriety of the Government's opening statements is demonstrated by the fact that Judge Gagliardi told the prosecutor to "limit ourselves to just an opening statement" and at the conclusion

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* Prior to trial, counsel for Canniff advised the court that he would raise the issue of entrapment. (Transcript of pretrial conference, January 6, 1975, at 3).

of the opening advised the jury that "the opinion of counsel as to the merits of their case is not a consideration for the jury." (Brief at 44). Again, this argument distorts the record. Judge Gagliardi asked the prosecutor to limit himself to an opening statement not immediately after the Assistant had discussed Canniff's entrapment defense, but after the Assistant had made the not uncommon observation in an expected short trial that, "[a]s you can see, this is relatively simple case. There is not a great deal that happened, but because it is simple that doesn't mean that it isn't important." (Tr. 25). The caution to the jury that the opinion of counsel as to the merits of "*their* case is not a relevant consideration" was plainly a correct statement of law, since such an opinion is irrelevant. But there is no indication in the record that Judge Gagliardi's statement, coming as it did after the Government's opening, was anything more than a usual admonition to the jury given in an abundance of caution. The assertion in Canniff's brief that this cautionary instruction was "prompted" by the Government's opening (Brief at 44) is without support in the record.

Defense counsel, both experienced trial attorneys (see Tr. 521), raised not even a single objection during the Government's opening statement. (Tr. 18-26).

B. The Government's Summation.

Canniff claims that in summation the Assistant United States Attorney "repeatedly expressed his personal belief in the guilt of the defendants; used the prestige of the Government he was supposed to be representing and his position as an Assistant United States Attorney to bolster the testimony of the Government witnesses and undermine the testimony of the defense witnesses, to misstate testimony and to make himself an unsworn witness attesting to facts not presented by any of the witnesses at trial; and made arguments which had no conceivable purpose except to en-

flame the passions of the jury against the defendants." (Brief at 30-31). These arguments lack merit.

It is important to note at the outset that, while Canniff claims that "[m]ost of the instances" of prosecutorial misconduct cited in his brief were objected to below, (Brief at 61), this is not significantly more true with respect to the Government's summation than it is with respect to the Government's opening statement. In a summation which fills 40 pages of the record and took over an hour to deliver, defense counsel for both appellants objected eight times. Judge Gagliardi sustained only one of those objections.* Of the seven remaining objections, only three can be fairly claimed to relate to any of the arguments now raised on appeal.** That defense counsel found few of the comments assigned as outrageous in this Court of so little moment that they neither objected during or after the summation is substantial evidence of the insignificance of any impact they could have had in the courtroom. See *United States* v. *Sawyer*, *supra*, 347 F.2d at 374. No less indicative of the tone and reasonableness of the Government's summation is the fact that Judge Gagliardi at no time saw fit to

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* An objection was sustained when Mr. Krieger, counsel for Benigno, objected to the statement, "Why does the Government believe Benigno is guilty? First —." In sustaining this objection Judge Gagliardi stated, "Yes, counsel's opinion, as indicated before, counsel's opinion as to the merits of the case is of no consequence to the jury." (Tr. 564).

** Counsel for Canniff objected to the statement that the Government informant Miller had a lot to lose if he lied. The court overruled the objection, stating "This is argument." (Tr. 541). Counsel for Canniff also objected to the argument that, while the character witnesses had never heard anything bad about Canniff, they had also never dealt with him in narcotics. The objection was overruled. (Tr. 544). Counsel for Canniff further objected to the argument that to find Canniff innocent it would be necessary to find that the agents had lied. This objection, too, was overruled. (Tr. 554).

independently exercise his control over the scope of argument. As the United States Supreme Court noted in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940), ". . . counsel for the defense cannot as a rule remain silent . . . and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper or prejudicial." See also *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). When defense counsel objects to an argument neither during nor after summation, ". . . an appellate court will reverse only if the summation was so 'extremely inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings' [citations omitted]." *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). This is plainly not such a case. Moreover, in assessing any of Canniff's claims of prejudice, whether newly made or one of the few raised below, it is of paramount importance to keep in mind the fundamental principle, recently reiterated by this Court, that, if an argument by the prosecutor is factually supported by the record, ". . . there is no basis to claim reversible error simply because the language was blunt and to the point." *United States* v. *Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

Canniff asserts that the prosecutor repeatedly sought to inject into the proceeding below his personal opinion of Canniff's guilt. It is argued, for example, that it was improper to tell the jury ". . . you can see as clearly as day that the defendants are guilty of what they are charged with doing." (Brief at 42). Excerpted in this manner, the statement might *arguably* be improper, though it is difficult to see how this would be an expression of personal opinon, unless Canniff maintains that, because an Assistant expresses a view that the evidence demonstrates guilt, it is necessarily a personal opinion, a position this Court has rejected. See *United States* v. *Torres*, 503 F.2d 1120, 1127 (2d Cir. 1974).

But when the statement is placed in its proper context, as it is in the margin,* and the elipsis are replaced with the rest of the sentence, the statement is in no manner objectionable. For this statement makes entirely clear that the *evidence presented* demonstrated the guilt of the defendants. *United States* v. *Tramunti,* Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. at 2164-65. No attempt was made to convey an impression, as has been held improper in so many of the cases relied upon by Canniff,** that the prosecutor had in his personal possession information that the jury did not, which conclusively demonstrated guilt. Rather, it is plain that the prosecutor was simply arguing that the proof in the record was sufficient to support a guilty verdict, a perfectly permissible purpose of summation. See *Lawn* v. *United States,* 355 U.S. 339, 359-60 n.15 (1958), and case cited with approval therein; *United States* v. *Davis,* 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied,* 415 U.S. 981 (1974); *United States* v. *Greer,* 467 F.2d 1064, 1072 (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973); *United States* v. *Hysohion,* 439 F.2d 274, 277-78 (2d Cir. 1971); *United States* v. *Meisch, supra,* 370 F.2d at 773, 777; *Orebo* v. *United States,* 293 F.2d 747, 749 & n. 1 (9th Cir. 1961), *cert. denied,* 368 U.S. 958 (1962); *Thompson* v. *United States,* 272 F.2d 919, 921 (5th Cir. 1959); *Henderson* v. *United States,* 218 F.2d 14, 19 (6th Cir.), *cert. denied,* 349 U.S. 920 (1955), and cases cited therein; *United States* v. *Holt,* 108 F.2d 365, 369-70 (7th Cir. 1939), *cert. denied,* 309 U.S. 672 (1940).

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* "Mr. Mitchell and Mr. Krieger would like you to turn your attention to Daniel Miller, turn the focus away from the defendants, and ask yourselves why is that. Because if your focus is on the right place, *on what the defendants said and what they did,* you can see as clearly as day that the defendants are guilty of what they are charged with doing." (Tr. 530) (emphasis supplied).

** See *United States* v. *Grunberger,* 431 F.2d 1062, 1068 (2d Cir. 1970); *United States* v. *Schartner,* 426 F.2d 470 (3rd Cir. 1970); *Dunn* v. *United States,* 307 F.2d 883 (5th Cir. 1962), all cited on page 42 of Canniff's brief.

The statements complained of on page 43 of Canniff's brief * are equally unobjectionable, even when wrenched, as they are, from the context of the full summation. The prosecutor was simply not conveying to the jury his personal assurance of the guilt of the defendants. The statements were part of a reasoned argument, *based on the evidence adduced at trial*, that these defendants should be found to have committed the crimes for which they were accused. Moreover, to the extent that the second of the quoted statements could have had any improper impact on the jury, it was more than cured by the curative instruction given by Judge Gagliardi upon an objection—the only relevant objection that was sustained during the prosecutor's summation—by Benigno's counsel, who does not join in Canniff's attack on the summation in this Court. (See Tr. 564). Similarly, on page 45 of Canniff's brief, there are three additional references to the Government summation, where it is claimed that the prosecutor "actually directed" the jury to convict the appellants. The allegedly offending passages, when read in the context of preceding paragraphs, sentences and pages are manifestly an argument to the jury that *based on the evidence presented* the defendants were guilty. Compare *United States* v. *Sawyer, supra,* 347 F.2d at 373 & n. 1.

Moreover, it is important to note that these arguments were made after defense summations in which counsel for Canniff concluded:

> "I believe ladies and gentlemen, when all the evidence is in, as it is now, when you have heard all the summations and his Honor's charge, you will bring

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* Those statements are:

"When you look at the defendants and you listen to their stories, you know they are guilty." (Tr. 532).

* * * * *

"Why does the Government believe Benigno is guilty?" (Tr. 564).

in the only verdict possible as to Bryan Canniff, namely, not guilty.

I thank you." (Tr. 516).*

When defense counsel stress their belief in the innocence of their clients, it is not error for an Assistant United States Attorney to submit to the jury, on behalf of the Government, an expression of belief in the case he has been presenting. See *United States* v. *Kiamie*, 258 F.2d 924, 934 (2d Cir.), *cert. denied*, 358 U.S. 909 (1958), and cases cited therein.

Canniff next argues that the prosecutor expressed his personal opinion concerning Canniff's predisposition to sell cocaine in a series of offending passages. (Brief at 45-46). First, it should be noted that these passages are on their face not expressions of a personal view. Second, ignoring entirely the context in which these statements were uttered, Canniff claims for example, that it is error to state, "Canniff is anxious to do this deal. He is in this for the money," when in fact the statement was made in the course of a full review of the evidence and when embellished with its true context reads:

"What happens then?

Well, Canniff is anxious to do this deal. He is in this for the money. So what does he do? He calls up his source, John. He comes back and he says, 'John's agreed to do one ounce at a time.'" (Tr. 537).

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* Counsel for Benigno also concluded with an expression of faith in his client's cause:

"The defendant has stated under oath he didn't do it. If I were to talk to you for another half hour, there is nothing further I could say. He didn't do it.

We weren't there. The Government has not been able to prove beyond a reasonable doubt the facts, the evidence necessary which would warrant a guilty verdict, and I submit that under those circumstances, you can, should, and I submit must return a verdict of not guilty.

Thank you so much." (Tr. 525).

Another example, taken in the order presented by Canniff should suffice to dispose of this argument. The allegedly objectionable passage reads: "Canniff wants this deal to go down. He is ready, willing and able to do this deal. He is eager." This passage, in the actual context it was uttered, is as follows:

> "Canniff is then told by the agents, 'We don't like it. It's not high quality cocaine.'
>
> Canniff then argues with the agents. He wants this deal to go down. He is ready, willing and able to do this deal. He is eager. So what does he say?
>
> He says, 'It is high quality cocaine. I never deal in bad stuff.'" (Tr. 538).

If Canniff's arguments were to succeed, prosecutors would be totally precluded from performing their duty of arguing all legitimate inferences from the evidence.* See *United States* v. *Gerry*, Dkt. No. 74-2100 (2d Cir., March 28, 1975), slip op. at 2606; *Orebo* v. *United States, supra,* 293 F.2d at 749.

Canniff also asserts, for the first time on appeal, that the Assistant United States Attorney expressed his personal opinion concerning the lack of credibility of the testimony of both defendants. He points principally to characteriza-

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* Pages 46 and 47 of Canniff's brief contain further quotations from the record which allegedly represent expressions of personal opinion by the prosecutor. Once again, each of these statements is an argument based on evidence adduced at trial. The assertion that they are expressions of personal opinion is utterly unfounded.

Equally spurious is the argument that the prosecutor "employed melodrama inappropriate to a federal courtroom" by pointing "an accusing finger at co-defendant Benigno" and proclaiming him to be Canniff's supplier of cocaine. (Brief at 46). If melodrama exists, it is far more evident in Canniff's brief than it ever was in the courtroom.

tions of the defendants' testimony as "preposterous" and as an "insult" to the jury's "intelligence." (Brief at 33). Although Canniff claims that this Court expressed its disapproval of the use of such terms in *United States* v. *Drummond,* 481 F.2d 62 (2d Cir. 1973), he overlooks both the unique circumstances which led to reversal in that case and this Court's decision in *United States* v. *Hysohion, supra,* 439 F.2d 274, that such terminology, in the circumstances of that case, constituted fair comment.

In *Drummond,* it was held that the cumulative effect of the egregious and persistent impropriety of the prosecutor's misconduct, in that case and others, warranted a reversal. *Supra,* 481 F.2d at 62, 64. In *Hysohion,* where the prosecutor argued that the defense put forth was "an insult to your intelligence" and an "outrage", *supra,* 439 F.2d at 278-79, the comments were held to be within the bounds of "permissible comment." *Id.* at 278. The court in *Hysohion* noted first that the segments of the summation alluded to, when read together with the omitted sections, disclosed the true tenor of the remarks; second, that there was nothing in the remarks to indicate to the jury that the statements were based upon personal knowledge of other defendants or that the Assistant was speaking as an expert; and third, that it was not irrelevant that the record provided support for the prosecutor's argument. *Id.* at 277-78.

Here, as in *Hysohion,* when the prosecutor's summation is read as whole, its true tenor and tone—which led experienced trial counsel to withhold objection—is readily apparent. The summation carefully dissected the testimony of the witnesses. The flagrant contradictions and inconsistencies of Canniff's testimony were exposed by reading directly from the record. (Tr. 544-49). The comments indicating Canniff's testimony had been fabricated had ample support in the record. See *United States* v. *Gottlieb, supra,*

493 F.2d at 994.* At no time did the Assistant hold himself out as an expert who had more experience in evaluating credibility than the jury. Here, as in *Hysohion,* when the summation is read in its entirety, it is simply a case of a prosecutor "arguing with some degree of fervor that the defense put forward by the appellants was not supported by the evidence." *Supra,* 439 F.2d at 278.

Canniff also claims that it was error to characterize him as a "prudent drug dealer" or simply as a "drug dealer." (Brief at 35). Since there was testimony at trial that Canniff had purchased peyote, cocaine, hashish and marijuana on 50 to 100 occasions from Daniel Miller for resale to others and that Miller had observed Canniff during these resales, the appellations were hardly more than descriptive. See *Myers* v. *United States,* 49 F.2d 230, 231-32 (4th Cir.), *cert. denied,* 283 U.S. 866 (1931). Also complained of are the prosecutor's use of the terms "cherub" and "innocent" to describe Canniff. While the use of these words was an oratorical excess,** the terms were used during presentation of an argument, based on the record, which contrasted the impression Canniff sought to convey on direct examination with his admissions on cross-examination. (See Tr. 545-47).*** Though the words could best have gone unsaid, Judge Learned Hand's observations in *DiCarlo* v. *United States, supra,* 6 F.2d at 368, are appropriate:

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* At sentencing, Judge Gagliardi commented on Canniff's "lack of candor" "on the stand," and his trial counsel observed that his lack of candor had been a foolish attempt to protect his friend. (Transcript of Sentencing, March 14, 1975, at 9).

** The mildness of these terms can, however, be contrasted with those discussed in *United States* v. *Benter,* 457 F.2d 1174, 1176-78 (2d Cir.), *cert. denied,* 409 U.S. 842 (1972). See also *Kowalchuk* v. *United States,* 176 F.2d 873, 877 (6th Cir. 1949).

*** For example, Canniff had testified twice on direct examination that he had never used drugs. On cross-examination he admitted having "tried" cocaine and marijuana.

> "While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. *To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials,* except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted." (emphasis supplied).

This is particularly so, since defense counsel occasionally resorted to rather fervent rhetoric.* See *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

It is also claimed that the testimony of Canniff's character witnesses was improperly attacked. Canniff claims that the prosecutor implied that Canniff was "the most venal person in the world," because he argued to the jury that everyone, even the most venal person in the world, would hope that, if they got into trouble, some decent people would come into Court and testify that they had never heard anything bad about them. (See Tr. 543). To expect the jury to have understood the prosecutor's argument as anything more than a statement that, when the character witnesses told them that they had never heard anything bad about Canniff, the

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* Counsel for Benigno referred to the DEA agents as "a group of angel-faced police" (Tr. 522), and to Daniel Miller, the informant, as having a "forked-tongue" and as "being plunged in the entrails of crime and degradation." (Tr. 521).

witnesses were telling the jury very little of value is nonsensical.*

Canniff also argues that, in commenting upon the character witnesses' testimony, it was improper to state:

> "The gentleman from the museum didn't even know about Bryan Canniff's conviction for burglary in the State of Minnesota." (Tr. 544).

This argument is premised on the fact that no judgment of conviction was ever introduced into evidence during the trial. However, shortly after the jury had been selected, counsel for Canniff conceded to Judge Gagliardi that Canniff had pleaded guilty to burglary in Minnesota in 1967.** Later, prior to Canniff's character witnesses taking the stand, Judge Gagliardi ruled that they could be questioned about their awareness of this guilty plea. (Tr. 210). The character witnesses then testified that they had never heard about this plea. (Tr. 218-19, 223). Since evidence of the conviction itself was never introduced into evidence, the prosecutor erred in stating that the character witness from the museum "did not even know about" the plea; instead, he

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* Canniff also argues that the prosecutor reinforced his personal expression of Canniff's guilt by stating:

> "No the character witnesses had never heard anything bad about Bryan Canniff. But then, they had never dealt with him in narcotics, and they . . . were not present on October 17, 1973. They didn't see what happened." (Tr. 544).

How this argument, that the character witnesses knew nothing about the facts of this case and had not had narcotics dealing with Canniff, can be translated into a personal opinion about the guilt of Canniff is almost unfathomable.

** This concession was made during an argument that the conviction could not be used by the Government because it was for a juvenile offense. (Tr. 10). The Government's position was that, based on Minnesota law, there was no reason to believe that the plea of guilty did not result in an adult conviction.

should have said they "had not even heard" about it. See *Gandy* v. *United States*, 386 F.2d 516, 519-20 (5th Cir. 1967), *cert. denied*, 390 U.S. 1004 (1968).*

It is difficult to see, however, how this slip of the tongue, see *Orebo* v. *United States*, *supra*, 293 F.2d at 749, could have prejudiced Canniff. There can be no question—after the concession of his own counsel—that Canniff had indeed pled guilty to burglary. Moreover, this statement was made during the course of the prosecutor's argument that the character witnesses knew very little about Canniff or the facts of this case. Manifestly, this statement would have been understood by the jury, in the context it was made, as one additional argument why the character witnesses' testimony was unilluminating. And if the statement was understood as a flat assertion that Canniff had been previously convicted, it is unlikely that the change to a proper phraseology—"had not heard he had been convicted"—would have caused the jury to have understood the statement in its non-prejudicial sense.

Canniff further claims that the prosecutor improperly sought to bolster the testimony of Government witnesses by implying that an association with the Government was a guarantee of credibility. (Brief at 37-38). The principal focus of Canniff's contention relates to allegedly improper arguments advanced concerning the credibility of Daniel Miller, the informant. Specifically, Canniff claims that it was error to state that if Miller perjured himself on the stand he risked prosecution; that Miller had a lot to lose if he lied; and that Miller told the truth. (Brief at 38-39).

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* Professor McCormick, however, takes the position that when there is a good faith basis for the question, it ought to be permissible to ask a character witness whether he *knows* that the defendant has previously been convicted of a crime. McCormick, Evidence § 191, at 457 (2d ed. 1972).

To place this argument in its proper perspective, it is necessary to allude briefly to the summations of defense counsel. Miller was a focus of Canniff's summation. The argument was made that without Miller's testimony Canniff's entrapment defense would have to be believed. To undermine Miller's testimony, defense counsel said:

> "We have Daniel Miller, and without being facetious, to use the term, who needs him?" (Tr. 496).
>
> * * * * *
>
> "From what you know of Daniel Miller, from what you have heard of Daniel Miller, from the inconsistencies, from the deliberate lies he has told, would you rely on Daniel Miller and purchase another carburetor?" (Tr. 497).
>
> * * * * *
>
> "He [Miller] got paid for it, I think $100, to sell a man's liberty." (Tr. 498).
>
> * * * * *
>
> "I mean, I could create a theory. I wish I were a prosecutor and I wish Daniel Miller were on trial.
>
> These two gentlemen [the DEA Agents], possibly my own client, I don't want to include Mr. Krieger's, my client could convict Danny Miller if he were the Government witness.
>
> That's the way Mr. Pedowitz [the Assistant United States Attorney] wants you to buy it. But that's not the thing. My client says 'Danny Miller gave me the sample.'" (Tr. 509).
>
> * * * * *
>
> ". . . Danny Miller is a person who should not be believed under oath . . ." (Tr. 514).
>
> * * * * *

> "I say to you that up on the witness stand he [Miller] was concealing facts about this case from the Government. . . ." (Tr. 514).*

In response to this attack on Miller's credibility, the prosecutor pointed out, *inter alia*, that Miller had no outstanding criminal charges against him, had already been sentenced for the offense that led him to become an informant, and had testified that he had been reluctant to testify in this trial, appearing only because he had been subpoenaed. The Assistant also pointed out that Miller, while under cross-examination, had admitted to other narcotics offenses for which he had never been convicted and about which he testified he had never told any law enforcement officer before.** From these facts it was argued that Miller had no interest in pleasing the Government by testifying against Canniff or Benigno and that his only motivation for testifying about the facts in this case and about his previously undisclosed offenses could be to tell the truth and thereby avoid a perjury prosecution.*** (Tr. 540-41). Here, there was no attempt to improperly vouch for a government witness because of facts personally known to the Assistant, but not introduced into evidence. See *Lawn* v. *United States*, *supra*, 355 U.S. at 359-60 n.15; *United States* v. *Davis*, *supra*, 487 F.2d at 125. Moreover, in light of the flat out assertions of Canniff's counsel that Miller should not be believed, that he was concealing facts under oath,

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*Counsel for Benigno also focused in on Miller:

> "I just want to make most respectfully, one thing basically clear, and that is how would you like your liberty to center about the forked-tongue of Miller? How would you like your future to be dependent upon a man who has confessed to being plunged, if you will, in the entrails of crime and degradation." (Tr. 521).

** Miller did not request nor receive immunity for his testimony.

*** *Cf. United States* v. *Murphy*, 374 F.2d 651, 654-55 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967).

and that defense counsel wished he could prosecute Miller with the Government's agents and possibly Canniff himself as witnesses, it was not error for the Assistant United States Attorney to seek to comment on Miller's credibility as he did. Thi was fair reply.* See *Lawn* v. *United States, supra,* 355 U.S. at 359-60 n.15; *United States* v. *Greenbank,* 491 F.2d 184, 188 (9th Cir.), *cert. denied,* 417 U.S. 931 (1974); *United States* v. *Davis, supra,* 457 F.2d at 125; *United States* v. *Santana, supra,* 485 F.2d at 370-71; *United States* v. *Buckner,* 108 F.2d 921, 928-29 (2d Cir.) *cert. denied,* 309 U.S. 669 (1940); *cf. United States* v. *Kiamie, supra.***

It is also claimed (Brief at 40) that the prosecutor "'interjected his beliefs and made an issue of his own credibility'" by stating:

> "The defense has tried to show you that some sort of sordid deal was put together between the Government and Daniel Miller." (Tr. 530).

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* We agree with Canniff that to the extent the prosecutor's remarks could be understood to suggest that any false testimony by Miller would inexorably result in a perjury prosecution, such an implication would be improper. However, to the extent that the prosecutor's statement was understood to contain this improper implication, it went so little beyond what would have been proper argument—that Miller stood a substantial risk of prosecution for a serious offense if he lied—that any error in the argument was necessarily harmless.

** Four other passages of the Government's summation are referred to on page 40 of Canniff's brief for which it is also claimed that the prosecutor sought to bolster testimony by associating the witness with the Government. Each of these passages represents arguments based on testimony in the record. It is hardly error, for example, to refer to a man as a experienced law enforcement officer, when there is testimony in the record that that is precisely what he was. (Compare Tr. 474, 475-76 with Tr. 537). See *Jackson* v. *United States,* 359 F.2d 260, 265 (D.C. Cir.) (Leventhal, *J.*), *cert. denied,* 385 U.S. 877 (1966). The chemist's hesitancy to fix his testimony to a mathematical certainty was the basis for the comment that he was not attempting to deceive the jury. (See Tr. 234-38,

It is further maintained that the Assistant, in making this statement, misrepresented the defense, because neither Canniff nor Benigno claimed that the Governmnt had participated in a "sordid deal." Canniff overlooks the fact that, during the cross-examination of Miller and Agent Hall, the defense established that Miller had been paid $1,100 by the Government, that his girlfriend had been released from custody as a result of Miller's agreement to cooperate and that Miller had been paid $100 as a result of his work in this case. (Tr. 498, 506). Canniff's counsel argued in summation:

> "What type of deal did Danny Miller make with the Government? I am not quarreling with informers, with people who want to help the Government. Mr. Pedowitz will tell you that's one of the ways we catch the narcotics distributors.
>
> But what I am quarreling with is the fact that as far as the defendant Canniff is concerned, 'I never dealt in narcotics and this Danny Miller entrapped me.'
>
> That is his version.
>
> He got paid for it, I think $100, to sell a man's liberty. In all he got about a thousand dollars more. For who, for strangers? No. For friends, people who got him jobs, people whom he knew." (Tr. 498).

While there may have been no explicit reference to a "sordid deal," this was certainly the fair import of defense cross-examination and summation, and it was not therefore error to so characterize it. *Cf. United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966).

Canniff also unjustly accuses the prosecutor of distorting the testimony given at trial and fashioning it into a version of the facts which was more beneficial to the prosecution. (Brief at 48). His principal claim is that it was

improper to argue to the jury that it would be necessary to believe the agents lied before Canniff could be acquitted,* because, he asserts, it would have been possible for the jury to believe the agents description of the events of October 17, 1973, yet still conclude that Canniff had been entrapped. First, it should be noted that Judge Gagliardi, who had the benefit of impartially listening to all of the witnesses, ruled, after objection was made to this line of summation, that this was permissible argument. (Tr. 554). Second, the argument was not, as Canniff's brief would make it appear, an argument constructed out of thin air. The argument was made after the Assistant had carefully analyzed (see Tr. 549-54) the ways in which the agents' version of the events of October 17, 1973, consistently differed from Canniff's and, if credited, established that Canniff had been a willing and eager participant in the narcotics distributions of that date. For example, Canniff claimed that *Miller* did most of the talking when he and Miller met the agents in Friday's; that *Miller* suggested that Canniff see the agent's flashroll; that Miller told Canniff to give the agents a sample of cocaine; that, upon Canniff's return to Friday's, after going to apartment 4E, *Miller threatened his life,* in the presence of an agent, to get him to go through with the deal; and that Canniff had not argued with the agents that the ounce package of cocaine was good quality and worth the price. The testimony of the agents directly contradicted each of these assertions, and this was not a case where the divergence in testimony between the agents and the defendant could have been explained as a misunderstanding by the agents. Therefore, if the agents were to be believed, Canniff was clearly painting an entirely false picture of the

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* It surely was not error to argue that to entirely accept Canniff's testimony it would be necessary to find that the agents had lied, since the agent's testimony was in almost all important respects in direct conflict with Canniff's. See *United States* v. *DeAlesandro, supra,* 361 F.2d at 697; *United States* v. *Marino,* 141 F.2d 771, 774 (2d Cir.), *cert. denied,* 323 U.S. 813 (1944).

degree of his involvement on October 17th and his willingness to go through with the deal. Moreover, if the agents were believed, it was almost inconceivable that Canniff had not initiated these transactions by introducing Benigno to Miller in early October. Canniff admitted to being an acquaintance of Benigno though he claimed he had never introduced Benigno to Miller. But while Benigno claimed that he had never seen Miller before Miller took the stand to testify against him, and Canniff claimed that, even though Benigno was in Apartment 4E on October 17th, he knew nothing about the sale of cocaine, Hall testified that Miller had described "John" as Italian, thin, in his 20's with long dark hair—in *early* October after a meeting with "John" and Canniff—a description which fit Benigno. In addition, Hall testified that, after arresting Benigno, he recognized his voice as the person who had been introduced to him as "John" on October 12, 1973. The jurors, if they believed the agents, certainly would have had to conclude that Canniff was not, as he testified, dragged into the events of October 17, 1973, but instead had been actively involved in introducing Benigno to Miller in early October. Thus, based on this evidence, it was certainly fair argument that it would be necessary to disbelieve the agents before Canniff could be found to have been induced to commit the offenses of October 17th. If there was misrepresentation, it is far more evident in Canniff's opening where it was claimed that he would agree almost entirely with the testimony of the agents and therefore the whole case would turn on Daniel Miller's testimony. (Tr. 30).*

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* Canniff also claims that the Assistant misrepresented the evidence when he said in summation that, upon returning to Friday's, Canniff said, "I want the money fronted." He asserts that the only testimony of the agents was that Canniff said *"John"* wanted the money fronted. However, Agent Magnuson testified:

> "When Bryan Canniff returned to the restaurant, he told Agent Sullivan and myself that his man did not wish to meet Agent Sullivan and myself.
>
> *He then asked us if we would give him the money to purchase the drugs.*" (Tr. 475).

Of no greater moment is Canniff's claim that he was prejudiced because the Assistant stated in summation that, when arrested, Canniff had told Agent Hall that "my man John is upstairs" when Hall had in fact testified only that Canniff said "a man named John" was waiting in the apartment. This was prejudicial, he maintains, because "[b]y replacing 'a man' with the colloquial drug expression for a supplier 'my man,' the prosecutor revised this particular testimony so as to support his theory that Canniff was an experienced drug dealer with an established source of drugs, again to counter the entrapment defense." (Brief at 50-51). While Canniff correctly notes that Hall testified that Canniff said "a man," he overlooks the fact that the agents' testimony contains repeated references to Canniff's use of the colloquial term "man" when referring to his supplier in Apartment 4E. (See Tr. 38, 40, 475, 477). Moreover, Hall's testimony was that Canniff had told him this man John was the source of the ounce and waiting for Canniff to return with the money. (Tr. 167).

Finally, Canniff extracts sentences and phrases of the prosecutor's summation, many of which he has previously alluded to, and argues that the prosecutor sought to appeal to the jury on an emotional level and thereby denied him a fair trial. (Brief at 51-53). Again, no objections were raised below to the passages now claimed to have been so highly prejudicial and emotion-packed. Appellant confuses *ad hominem* and immaterial arguments with advocacy.*

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* Canniff quotes from Judge Lumbard's opinion in *United States* v. *Burgos*, 304 F.2d 177 (2d Cir. 1962), where criticism was leveled at a Government summation in which immaterial, improper and repeated references were made to the fact that the defendant had concealed a package of cocaine in a *child's* room, where the sole issue was whether the defendant knew what was in the package. No such immaterial and prejudicial arguments were made in the instant case. The single reference to children in the Government's summation was an attempt to have the jurors assess, based on experience with their own children, whether Canniff's claim of inducement was a credible one. (See Tr. 562).

C. Cross-examination.

In Canniff's ceaseless effort to convince this Court that, though the evidence overwhelmingly pointed to his guilt, the Assistant United States Attorney deprived him of a fair trial, he comes from over 900 questions asked of both defendants on cross-examination a number for which objection were sustained and claims they were unduly prejudicial. Although the Government readily concedes that some objectionable questions were asked of these defendants, none of these questions lacked a basis for inquiry in the record and none of the questions sought to introduce prejudicial matter.

For example, Canniff argues (Brief at 55) that the following question was irrelevant and asked solely to prejudice him:

> "Are you accustomed to associating yourself with people who threaten other people with violence?" (Tr. 293).

This question was asked after Canniff had testified that Miller had threatened him on October 17, 1973 and Canniff believed this threat, because Miller, in Canniff's presence, had threatened other people with violence. It was hardly irrelevant to probe why or whether Canniff would continue to associate with people who he truly viewed as potentially violent.

Also objected to, though it is hard to see any possible prejudice, is the question:

> "You start pretty big, don't you?" (Tr. 305).

Here again this was a question, though objectionable in that it was conclusory, in which the aim was to show that, while

Canniff claimed that he had never before dealt in narcotics, his first sale—for 5 ounces—was an unusually large one.*

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* Canniff asserts it was error to ask, "Do you know what happens to people who welch on narcotics deals?" (Tr. 321). This question was asked after Canniff testified that he had not met his alleged source of cocaine on his first trip to apartment 4E, yet returned to ask the undercover agents to advance their money to him, even though he did not know if Aponte would have the cocaine in the apartment when he returned. (Tr. 320-21). He also testified that he returned to Friday's afraid and scared. The objected to question was asked to show the illogic of a man who testified that he was already scared asking people he did not know to advance money for cocaine he did not know would be available for sale.

Not content to limit himself to questions asked of himself, Canniff also claims it was error to ask certain questions of his codefendant. Complained of is the question:

> "Q. And it didn't bother you to stay overnight?
> A. No.
> Q. In a cocaine dealer's house?" (Tr. 425).

Here, once again, the Assistant was trying to show the illogic of a defendant's testimony that he knew Aponte was a cocaine dealer, that Aponte left cocaine around the house, that Benigno never used cocaine, yet Benigno saw no reason why he should not spend nights in Aponte's apartment.

Canniff also claims it was prejudicial to ask questions which would require him to acknowledge that the charges against him were serious. First, it could have hardly have escaped the jury, long before these questions were asked, that the charges against Canniff were "serious". Moreover, the questions were asked, in what could hardly be described as a prejudicial and immaterial context:

> "Q. When you gave Agent Sullivan the sample outside Friday's, you knew you were breaking the law, didn't you?
> A. Yes, I did.
> Q. You knew cocaine was considered a dangerous drug by the federal government, but you gave the sample anyway?" (Tr. 306).

(See also Tr. at 309). The questions were asked to show first that Canniff was knowingly breaking the law and second that he

[Footnote continued on following page]

Canniff also quotes liberally from his cross-examination in which his familiarity with narcotics jargon is probed. During Canniff's direct and cross-examination, he testified that Benigno told him to return to Friday's and tell the agents "that *the deal could not go down* because Juan Aponte wasn't there" (Tr. 276) and that "I understand something *went down between* [*Ed Lindell*] *and Danny* [*Miller*]." (Tr. 287) (emphasis added). He also testified on direct that "Later I—at DEA Headquarters I stated that I did—you know, *that the trip* was arranged by Daniel Miller." (Tr. 280). Where the Assistant asked argumentative questions in an attempt to explore the unusual vocabulary of a man who claimed to have never dealt in narcotics, objections were properly sustained. Any prejudice is impossible to perceive.*

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was knowingly committing an offense which was not minor. Surely, Canniff's perception of the seriousness of his action was relevant to the question of his predisposition to commit the offenses for which he was charged and the strength of any governmental inducement.

* Canniff also maintains that the prosecutor in two series of questions repeatedly asked argumentative questions after objections had been sustained. (Brief at 55-58). With respect to the first series of questions, the Assistant sought to establish, after Canniff's testimony on direct that he was in substantial agreement with the agents' testimony (Tr. 272-73), that Canniff's testimony in fact was in direct contradiction to much of what the agents had said. It was error because argumentative to inquire first whether Canniff believed the agents to be wrong or to have lied about their version of the facts, since this was irrelevant, but it was not irrelevant to inquire whether Canniff knew any reason why the agents should lie about their version of the facts.

As to the second series of questions (Brief at 57-58), Canniff had testified on direct that prior to the events of October 17th, Miller had bought drinks and food for him and given him furniture and concert tickets—with the plain implication that these favors had induced him to participate in the events of October 17th. (See Tr. 267-68). While the trial judge sustained a series of objections to questions such as:

"Q. Daniel Miller gave you some concert tickets?

A. That is correct.

Q. And that led you to do a narcotics deal, correct?"

it is respectfully submitted that these questions were not improper.

Canniff also claims it was prejudicial to refer to John Aponte as this "supposed" John Aponte in three questions asked by the Assistant. (See Tr. 326, 337, 338). It is interesting to note that only the third question was objected to; moreover, it can be expected that the jury had, long before these questions were asked, come to realize that there were serious doubts about the existence of Mr. Aponte.

Canniff also argues that the prosecutor improperly sought to imply the guilt of his *codefendant* from his association with others with the following question:

> "Q. You knew he [John Aponte] was a cocaine dealer?
> A. I found that out later.
>
> * * * * *
>
> Q. But that didn't prevent you from living with him, did it?" (Tr. 422-23).

The purpose of this question had nothing to do with guilt by association.* The point of the question was to show the illogic of Benigno's contentions that he was involved with drugs, knew nothing about the true meaning of the events on October 17th, never had a conversation with Canniff about narcotics, yet saw no problem in living with a man who he knew left narcotics lying about the apartment and regularly dealt in cocaine.**

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* Canniff also maintains that this question was improper, because it implied the prosecutor's disbelief of Benigno's prior testimony that he never lived with Aponte, but only did carpentry for him. Canniff overlooks Benigno's testimony that he occasionally spent the night at Aponte's apartment (Tr. 425) and his prior testimony at a pretrial suppression hearing that he had been working as well as staying at the apartment for approximately 2 months. (Transcript of suppression hearing, January 9, 1975, at 33).

** Canniff also attacks the general conduct of the prosecutor (Brief at 54). Here, appellant, as is his wont, engages in low blows. The judge once commented upon the Assistant's tone of

[Footnote continued on following page]

D. Conclusion.

Canniff has attempted to turn his trial of men whose guilt was abundantly proved into a trial of Government's counsel. This tactic which has become common-place ought not to succeed under the facts of this case. While the Government would be the first to concede that Canniff did not receive a perfect trial, we respectfully submit he did receive a fair one.

It remains only, in view of Canniff's reference to the words of this Court in *United States* v. *Benter, supra*, 457 F.2d at 1178 (2d Cir. 1972), to the effect that concern exists that, without reversal, rebukes to prosecutors may go unheeded, to assure the Court that no Assistant United States Attorney in this Office deliberately engages in improper conduct with the idea that criticism is a small price to pay for a conviction. In any case in which this Court finds that an Assistant United States Attorney has done so, reversal is the appropriate remedy, indeed, the only proper one. However, we submit that the imperfections which

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voice in questioning Canniff, this becomes "his yelling at the witnesses" (Tr. 330); the judge once told the jury that facial expressions should be ignored without saying that the prosecutor had used any, this becomes the judge's warnings to disregard "his smirking at the jury" (Tr. 298); and the judge's request that the Assistant remain at the lectern while questioning because defense counsel's view of the witness would be hindered, becomes "his repeatedly blocking the jury's and the Court's view of the witnesses." (Tr. 287, 289, 296).

Where the prosecutor occasionally engaged in an impropriety, as when he inadvertently interrupted Judge Gagliardi during a legal argument outside the presence of the jury, he was properly admonished. (See Tr. 391). But this, too, was not a case where judicial praise was entirely absent. (See Tr. 248). If the defendants were occasionally interrupted before they completed an answer, this was not a deliberate attempt to cut off answers. If the prosecutor had been ill-mannered before the jury, it would have been far more prejudicial to the Government's case than the defendants'.

occurred here did not spring from a deliberate and conscious calculation to obtain a conviction by prejudicing a defendant and wilfully trifling with the admonitions of this Court.

POINT II

Defendant Canniff's Sixth Amendment right to a speedy trial was not violated.

Defendant Canniff asserts for the first time on appeal that the indictment in this case must be dismissed based on his Sixth Amendment right to a speedy trial.

Canniff entirely failed to assert this claim below, even after the question was alluded to *sua sponte* by the District Court. Accordingly, this issue should not now be considered by this Court, since it is well settled that a failure to assert a Sixth Amendment speedy trial claim either before or during trial precludes the issue from being raised in the Court of Appeals. *United States* v. *Smalls*, 363 F.2d 417, 419 (2d Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967); see *Benson* v. *United States*, 402 F.2d 576, 580-81 (9th Cir. 1968); *Chapman* v. *United States*, 376 F.2d 705, 707 (2d Cir. 1967); *United States* v. *Beigel*, 370 F.2d 751, 756-57 (2d Cir. 1967); *United States* v. *Bennett*, 364 F.2d 499 (2d Cir. 1966); *United States* v. *Booker*, 363 F.2d 856, 857 (2d Cir. 1966); *cf. United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Lusterino*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Indeed, this case is an object lesson in why defendants should be required to raise speedy trial issues in the District Court rather than in the Court of Appeals for the first time. Here, counsel for Canniff twice goes outside the record to make factual assertions of which he has no personal knowledge concerning his clients deprivation of rights (Brief at 67, 71)—arguments which might well be countered if they had been properly asserted in the trial court. See *Chapman* v. *United States, supra,*

376 F.2d at 707. Cf. *United States* v. *Rivera*, 513 F.2d 519, 531 (2d Cir. 1975).

However, assuming *arguendo* that the merits of the claim were to be reached by this Court, the record in this case does not support any claim of deprivation of Sixth Amendment rights. Defendant Canniff was arrested on December 17, 1973. An indictment was filed on October 7, 1974 and the defendants were arraigned on October 21, 1974. Three days later, on October 24, 1974, the Government filed a Notice of Readiness for Trial. On November 1, 1974 the District Court held a pre-trial conference. The transcript of that proceeding demonstrates that any delay between indictment and trial was attributable to Canniff's attorney who was not available for trial earlier than January, 1975. The colloquy between the Court and counsel on this point was as follows:

> "The Court: What about Canniff.
>
> Mr. Mitchell: Canniff, your Honor, is going to go to trial.
>
> The Court: How soon?
>
> Mr. Mitchell: January, Judge.
>
> The Court: Why?
>
> Mr. Mitchell: Because I am in the middle of a situation. You know, Judge Bonsal was supposed to start a case with me, a case which he begged me to take and I didn't want to take it. I did it as a favor. When the chief of the Assignment Bureau gives me a case, it is a rarity. If you think the other fellow that I spoke to is a nut, this one is more of a nut. We finally got the case separated for trial, Judge Bonsal took sick. And it dragged and dragged. I couldn't stall. He wants to try that one December 3rd and it will run to the end of the year. I am booked. I start with Judge Tenney at the end of November. And going backwards, I have State matters that are piled up. I will be sincere on it, Judge. It's not

an assignment, its a retainer." (Tr. Nov. 1, 1974, at 2-3).

* * * * *

"The Court: There is no way at all of your being ready before January?

Mr. Mitchell: If anything breaks, I will let you know.

The Court: All right. Then why don't we put it on—January 1st is on a Wednesday, why don't we put it on for the following Monday.

Mr. Mitchell: January 6, Judge.

The Court: January 6 for trial, with the proviso, Mr. Mitchell, that if you break away from something earlier, you let me know and if we can put it on, you will let me know . . . ." (Tr. Nov. 1, 1974, at 4).

The trial actually commenced on January 8, 1975. It was on December 26, 1974—at the end of the two-month period which passed to accommodate defense counsel's schedule—that Canniff's twenty-sixth birthday occurred. Canniff claims because he was thus precluded from being sentenced under the Youth Correction Act, his Sixth Amendment rights were violated.

Canniff bases this claim on *United States* v. *Roberts*, Dkt. No. 75-1052 (2d Cir., April 9, 1975) slip op. 2795.* In *Roberts*

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* Judge Timbers dissented from Judge Smith's opinion in *Roberts*, and four weeks after joining in the Court's opinion, District Judge Bryan filed a concurring opinion which stated:

"I concur in affirming the order appealed from on the ground that, under the highly unusual circumstances of this case, dismissal of the indictment by the District Court was a *proper exercise of judicial discretion.*" Slip op. 2809 (emphasis supplied).

That Judge Bryan has concurred in the opinion on the ground that there was no abuse of discretion undermines substantially the precedential value of Judge Smith's opinion.

A petition for rehearing in *United States* v. *Roberts, supra*, was filed by the United States Attorney for the Eastern District of New York on May 23, 1975 and is presently pending before this Court.

a defendant turned twenty-six during the thirteen months which elapsed after his indictment and while he was awaiting entry of a guilty plea, pursuant to an agreement with the government. Upon defendant's motion to dismiss for a violation of his Sixth Amendment right to a speedy trial, the District Court dismissed the indictment and this Court affirmed that decision.

Appellant Canniff argues that the four factors enumerated in *Barker* v. *Wingo*, 407 U.S. 514 (1972), as applied in Judge Smith's opinion in *United States* v. *Roberts*, *supra*, balance in this case to require the dismissal of the indictment. Thus he claims that the length of delay; the reason for the delay; the prejudice incurred; and the defendant's assertion of his right to a speedy trial add up in this case to a Sixth Amendment violation as found in Judge Smith's opinion in *Roberts*. However, assuming *arguendo* that this issue can be raised for the first time on appeal and without the support of a proper factual record below, this case is distinguishable from the *Roberts* case in several crucial respects.*

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* In distinguishing *Roberts* we do not mean to suggest that we agree with the views expressed in Judge Smith's opinion. The effect of that opinion is, essentially, to require District Judges to try and sentence any defendant eligible for Youth Offender or Young Adult Offender treatment before the passage of time deprives him of that eligibility. While there can be no question that it is desirable that an offender eligible for such treatment not be foreclosed from it merely because he grows too old, that is a very different notion from the position taken in *Roberts*, which engrafts a statutory sentencing alternative onto the Sixth Amendment.

We also respectfully submit that it is inappropriate that a defendant, represented by counsel, can enter into a plea bargaining agreement which necessarily contemplates that Young Adult Offender treatment may become unavailable and then, only after that eventuality occurs, can complain successfully for the first time that the delay violates his Sixth Amendment rights.

With respect to the length of the delay and the reason for the delay, Canniff argues that this case is stronger than *Roberts* simply because the delay was two months longer than the 13 months which elapsed in the *Roberts* case. However, neither a 13 month nor a 15 month delay is *per se* unreasonable, and each is far shorter than other periods of delay previously countenanced in this Circuit.* The 13 month period was held to be violative in *Roberts* only because it was during that interim that the defendant's twenty-sixth birthday had passed. However, in this case the Government stood ready for trial on October 24, 1974—two months before the defendant's twenty-sixth birthday. The delay between that date and December 26, 1974, Canniff's birthday, was attributable to the defendant, not the Government.** Whatever the Government's obligation is to one

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* *United States* v. *Drummond*, Dkt. No. 74-2264 (2d Cir., Feb. 11, 1975), slip op. 1781, 1789 (1 year "not excessive"); *United States* v. *Counts*, 471 F.2d 422 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973) (16 months); *United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) (24 months); *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973) (28 months); *United States* v. *Fasanaro*, 471 F.2d 717 (2d Cir. 1973) (4 years); *United States* v. *Stein*, 456 F.2d 844 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972) (5 years); *United States* v. *Saglimbene*, 471 F.2d 16 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

** The reason for the 12 month delay prior to indictment can only be explained by going outside the record on appeal in this case. Canniff claims that the reason for delay was the Government's "indecision" as to whether to indict his co-defendant, Benigno. Brief at 67. However, if given an opportunity to explain the delay upon an appropriate motion in the District Court, the Government would have contended that the delay was engendered at least in part by an agreement whereby Canniff offered to cooperate with the Government in this and other cases, and to plead guilty to an information. In exchange, the Government agreed to delay indictment pending that cooperation. Delay caused by an agreement such as this one has been found by this Court to be properly attributable to the defendant. *United States* v. *Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

who is cooperating with the Government to guaranty that he suffers no prejudice because of delay, as in *Roberts*, that obligation surely ceases when the defendant makes clear that he is no longer interested in cooperating.

As to prejudice, more so than with respect to *Roberts*, any claim here that Canniff would have been sentenced pursuant to the Federal Youth Correction Act is purely speculative. In Roberts' case the District Court stated that there was a "'real and substantial' possibility" that he would have received the advantages of youthful offender treatment, considering that the crime (possession of stolen mail), was his first offense and that he was cooperating with the Government. *United States* v. *Roberts, supra,* at 2801. With respect to Canniff, there was no prediction by the District Court that youthful offender treatment was probable. Moreover, unlike Roberts, Canniff was not cooperating nor was his present conviction—a narcotics violation—his first offense.* Therefore, any claim of prejudice in this case is based only upon appellant's optimistic expectations.**

Finally, as to the defendant's assertion of his Sixth Amendment right, not only did the defendant fail to assert his right at any time, he explicitly waived his right to a

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* Canniff had previously pled guilty to burglary in Minnesota in 1967. (Tr. 10).

** This, of course, assumes that sentencing under Youth Corrections Act would have been sought by Canniff. As Judge Timbers pointed out in *United States* v. *Roberts, supra* at 2808-09, many eligible defendants do not seek sentencing under the Youth Correction Act and defendant's failure to assert a right to a speedy trial is at least some indication that neither defendant nor counsel preferred sentencing under that statute.

Moreover, it should be noted that "Young Adult Offenders" (*i.e.* those between 22 and 26) do not enjoy the same presumption in favor of Youth Corrections Act sentencing as their younger counterparts. See *United States* v. *Kaylor,* 491 F.2d 1133, 1137 (2d Cir.) (*en banc*), *vacated on other grounds,* 418 U.S. 909 (1974).

speedy trial as assured by the six-month rule under the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases. This was made a matter of record at the November 1, 1974 pre-trial conference:

> "The Court: When does the six-month period start here? I see it's been waived, but that doesn't mean anything to me.
>
> Mr. Pykett: I believe the arrest was made in October of '73, your Honor.
>
> Mr. Mitchell: I waived it.
>
> Mr. Krieger: I waived it.
>
> The Court: And the clients are aware of the fact that it's been waived?
>
> Mr. Mitchell: Yes.
>
> Mr. Krieger: I have explained everything to my client." (Tr. Nov. 1, 1974 at 3-4).

Canniff tries to argue that his deliberate waiver of the six-month rule in no way affects his present claim that his Sixth Amendment rights were violated. However, such a waiver must necessarily undercut any assertion that the Government was obliged to move this case to trial during at least that time period.

This case is clearly one where the defendant chose not to "hasten his day in Court" and this Court, in following *Barker* v. *Wingo, supra,* has stated that a defendant cannot later successfully assert his Sixth Amendment right after assuming that posture. *United States* v. *Roemer,* Dkt. No. 74-2677 (2d Cir., Apr. 8, 1975) slip op. 2773; *United States* v. *Drummond, supra,* slip op. at 1790; *United States* v. *Schwartz,* 464 F.2d 499 (2d Cir.), *cert. denied,* 409 U.S. 1009 (1972). In the totality of these circumstances, this Court should find, if the issue is reached, that Canniff's Sixth Amendment right to a speedy trial was not violated.

POINT III

The Trial Judge did not err in permitting Canniff's character witnesses to be cross-examined about their awareness of his 1967 plea of guilty to burglary.

Canniff claims that it was error for the trial judge to permit character witnesses to be asked if they had heard that Canniff had pleaded guilty to burglary in 1967. (See Tr. 217-19, 223). Specifically, it is maintained that, absent any showing of proof of such a conviction, the question was without a proper foundation.

It has long been recognized that, when a defendant offers character testimony, "it is permissible to ask these witnesses whether they have 'heard' of rumors which could injuriously affect their evaluation, provided that the prosecution acts in the good faith belief that the incidents to which the questions allude actually occurred, and the jury is instructed as to the limited weight such 'evidence' may be given." *United States* v. *Beno,* 324 F.2d 582, 588 (2d Cir. 1963), *cert. denied,* 379 U.S. 880 (1964); see *Michelson* v. *United States,* 335 U.S. 469, 479 (1948), *aff'g,* 165 F.2d 732 (2d Cir.); *United States* v. *Gosser,* 339 F.2d 102, 112 (6th Cir. 1964), *cert. denied,* 382 U.S. 819 (1965); 3A Wigmore, Evidence § 988 (Chadbourn ed. 1970).

Here, the inquiry of the character witnesses can not be characterized as lacking a good faith basis. At the outset of the trial, outside the presence of the jury, the Government stated that it had exemplified copies of materials which would satisfy the trial judge that Canniff had pleaded guilty to burglary in Minnesota in 1967 and counsel for Canniff *conceded* that his client had been so convicted while 18 years of age. (Tr. 10-11). Before the character witnesses took the stand, Judge Gagliardi ruled that they could be asked about the plea of guilty. (Tr. 208-10). This was not a case where

the trial judge failed to satisfy "himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box." *Michelson* v. *United States, supra,* 335 U.S. at 481.

Canniff claims nonetheless that the prejudicial impact of the inquiry outweighed its evidentiary value. But here the trial judge properly instructed the jury that the import of the questions was limited to the credibility of the character witnesses (Tr. 219), see *United States* v. *Gosser, supra,* 339 F.2d at 112, and if prejudice was suffered by the reference to Canniff's guilty plea, he surely had it within his power to avoid this by not injecting the issue of his character into the proceedings.* *Cf.* McCormick, Evidence § 191, at 459 (2d ed. 1972). This is simply not that rare case of prejudicial impact where the trial judge can be said to have abused his discretion, see *Michelson* v. *United States, supra,* 335 U.S. at 480, in permitting the inquiry.

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* Canniff claims that the error in permitting the witnesses to be asked about the guilty plea was compounded, because defense counsel had claimed that the guilty plea resulted in a juvenile or youthful offender conviction (see Tr. 10, 208) and the Government failed to demonstrate that the guilty plea to burglary was therefore truly a conviction.

The Government took the position at trial that, under the law of Minnesota, Canniff's plea of guilty was a conviction and that the Government's only information was that Canniff had been convicted as an adult. (Tr. 10-11, 209). At no time did defense counsel offer to shed any light on his claim that the conviction had a status under Minnesota law which would prevent its admission, nor does he do so now. And, in any event, Judge Gagliardi concluded that, whether or not the plea resulted in a youthful offender conviction, a character witness, who as a general rule is subjected to a broad range of inquiry, could be questioned about his awareness of it. (Tr. 210).

POINT IV

The District Court did not err in denying Canniff's request for inspection of Miller's pre-sentence report.

Canniff claims that the trial judge was in error in refusing to order the probation department to supply a copy of Miller's pre-sentence report because he was entitled to this report under Section 3500(b) of Title 18, United States Code, and under the principles of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). This claim is without merit.

After cross-examination of the Government's informant Miller, Benigno's and Canniff's attorneys jointly requested to be given copies of Miller's pre-sentence report. (Tr. 128). Benigno's attorney further sought permission to call Miller's probation officer as a witness. (Tr. 128-29). When an offer of proof was sought, Benigno's attorney stated that he intended to show that Miller had not revealed to his probation officer the "prior derelictions," which he had admitted during cross-examination. (Tr. 129). Miller had conceded on cross-examination that he had not told the probation officer about many of the criminal activities that he admitted at trial, although Miller contended that he had not been asked. (Tr. 99). Thus, counsel intended to use the pre-sentence report and the testimony of the probation officer to prove only that the probation officer had in fact asked Miller about prior crimes. (Tr. 129).

First of all, it should be clear that a witness' statements to his probation officer are not statements "in the possession of the United States" under Section 3500(b) of Title 18, United States Code, unless in the actual possession of the prosecution for some reason. Section 3500(b) cannot be read as requiring production by the prosecution of a witness' statement to a United States Probation Officer, because the prosecution has no power to obtain such state-

ments. *Cf.* Rule 32(c)(2), Federal Rules of Criminal Procedure. The Probation Office is an arm of the judicial branch of the Government. Title 18, United States Code, Sections 3653-3656; *United States* v. *Greathouse,* 181 F. Supp. 765 (D. Ala. 1960). The United States Attorney's Office cannot be ordered to produce under Sections 3500(b) statements it does not have (Tr. 131) and has no power to obtain.

Second, the principles of *Brady* v. *Maryland, supra,* have no applicability. There is no claim of the "prosecution's suppression of evidence" here, which is at the "heart" of *Brady.* See *Moore* v. *Illinois,* 408 U.S. 786, 794 (1972). The United States Attorney's office did not have access to Miller's pre-sentence report and continues to have not the slightest reason to believe the report would be helpful to the defense. *Id.* at 794-95. In addition, the "evidence" sought cannot be said to be "material to either guilt or punishment" of Canniff. *Brady* v. *Maryland, supra,* 373 U.S. at 87; see *Moore* v. *Illinois, supra,* 408 U.S. at 795; *United States* v. *Brawer,* 367 F. Supp. 156, 169 (S.D.N.Y. 1973), *aff'd,* 496 F.2d 703 (2d Cir. 1974). The report was sought only because it might *conceivably* contradict Miller on the question of whether he had previously been asked about his past derelictions—a question which relates to Canniff's "guilt or punishment" in a barely tangential fashion.

Finally, the District Court surely did not err in refusing to order production of the report since it properly determined that the sole use to be made of this report would have been in a collateral line of inquiry. (Tr. 129, 130, 131). The court had already granted defendants unusually broad latitude in cross-examination by permitting counsel to question Miller not merely about his prior convictions, but also about general criminal activities not resulting in convictions.

(Tr. 97, 102, 122, 143-45).* Under these circumstances, the Court did not abuse its discretion in declining to order an *in camera* inspection of Miller's pre-sentence report for the purpose of determining whether Miller had been asked by his probation officer about his prior misdeeds not resulting in convictions.**

POINT V

Benigno was not deprived of a fair trial when he denied having been convicted of grand larceny or burglary as a youthful offender.

Appellant Benigno argues that it was prejudicial error to ask him whether he had ever been convicted of burglary or grand larceny or as a youthful offender. More specifically, it is claimed that there was no good faith basis for asking these questions; that it was, in any event, error to seek to impeach Benigno with a youthful offender adjudication; and that, although he consistently denied that he had ever been convicted, he was nonetheless prejudiced by the asking of the questions.

Prior to Benigno taking the stand his counsel advised that he had a "YO conviction." (Tr. 213; see also Tr. 12).

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* Alleged misconduct of a witness not resulting in a conviction is generally held inadmissible. See *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Dove*, 360 F.2d 1 (2d Cir. 1966); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954).

** Although there was some suggestion that at least Benigno's attorney would subpoena the probation officer, the probation officer was not in fact subpoenaed. (Tr. 128-29, 367). Enforcement of subpoenas *duces tecum* directed to probation officers for similar purposes has not been favored. *United States* v. *Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990 (1974); *United States* v. *Greathouse*, *supra*. Nevertheless, defendant's failure to pursue that course of action is some indication of trial counsel's own assessment of the importance of the pre-sentence report for impeachment of Miller.

The Government at that time took the position that, if Benigno took the stand, it would not impeach him with this conviction. (Tr. 213). However, during the cross-examination of Benigno, his counsel asked, "Have you ever been convicted of a crime?" and Benigo answered that he had not. This question had no relevance to any issue at trial, save to paint Benigno, misleadingly, as a man without blots on his escutcheon. The Government argued that, by asking this question, defense counsel had opened the door to inquiries about Benigno's youthful offender conviction, a position with which the trial judge agreed. (Tr. 381).

Because, under state law, the records of Benigno's youthful offender adjudication were unavailable to the Government, the questions asked of Benigno concerning convictions for grand larceny and burglary were based on his FBI arrest record, the prosecutor anticipating that these charges had led to Benigno's youthful offender conviction.* The prosecutor was not acting in bad faith in asking these questions. The questions were asked, because defense counsel had previously confirmed that Benigno had been a youthful offender and Benigno's FBI arrest record disclosed arrests for only burglary and grand larceny, a more than adequate "good faith" basis. *E.g., United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).**

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* Benigno denied he had ever been convicted of either crime. He also denied ever having been convicted as a youthful offender (Tr. 379-81).

** Benigno had apparently told the Assistant United States Attorney who interviewed him that he had a youthful offender adjudication for illegal entry and this was recorded on the interview sheet. (Tr. 403). The prosecutor later told the trial judge that he had overlooked this notation on the interview sheet (Tr. 411, 403), and offered to stipulate with defense counsel that Benigno had been convicted as a youthful offender for illegal entry. (Tr. 408). Defense counsel took the position that Benigno had never been convicted. The record is still unclear as to the offense or offenses for which Benigno was adjudicated as a youthful offender.

Benigno claims, however, that in any event, it was error to attempt to impeach him by way of his youthful offender adjudication, since state law forbids this. Benigno correctly notes that New York case law proscribes impeachment by way of a youthful offender adjudication, since the adjudication is not deemed a conviction. *People* v. *Rahming*, 26 N.Y.2d 411, 311 N.Y.S. 2d 292 (1970); *People* v. *Vidal*, 26 N.Y.2d 249, 253-54, 309 N.Y.S. 2d 336, 339-340 (1970). However, what he overlooks is that the state policy preventing mention of his adjudication does not in any way preclude the cross-examiner from bringing out the facts which underlie the adjudication. *People* v. *Duffy*, 36 N.Y.2d 258, 367 N.Y.S. 2d 236 (1975); *People* v. *Rahming*, *supra*, 26 N.Y. 2d at 419, 311 N.Y.S. 2d at 299; *People* v. *Vidal*, *supra*, 26 N.Y. 2d at 253-54, 309 N.Y.S. 2d at 339-340. Thus, while it would not be permissible under New York law, for example, to ask a defendant if he had been adjudged a youthful offender in 1970 as a result of a robbery, it would not be improper to question him about the fact that he had committed a robbery in 1970 and to expose the details of the robbery.

Surely, the exploration of the underlying facts of a youthful offender adjudication which is permitted by state law is potentially far more damaging to the credibility of a defendant than is the fact of his adjudication as a youth offender. Moreover, the fact that the state courts do not preclude an examination of the facts of a youthful offense indicates that the state's policy is not based on a belief that a defendant whose credibility is at issue should not be held responsible for his youthful acts. In essence, therefore, New York law does not prevent the defendant from being held to account for his transgression while a youth offender.

Under federal law, of course, it is generally improper to impeach a defendant by his prior acts of misconduct which have not resulted in a *conviction*. See *United States* v.

Miles, supra, 480 F.2d at 1217; *United States* v. *Kahan,* 479 F.2d 290, 294-95 (2d Cir. 1973), *rev'd on other grounds,* 415 U.S. 239 (1974); *United States* v. *Glasser,* 443 F.2d 994 (2d Cir.), *cert. denied,* 404 U.S. 854 (1971); *United States* v. *Provoo, supra,* 215 F.2d 531. But see F.R. of Evidence 609(b). Therefore, if "conviction" is to be defined, in this instance, by state law, the federal courts are entirely foreclosed from impeaching a defendant by proof of his youthful offense. This would not give effect to state policy which holds the defendant to account for his offenses. The defendant would thus be given far more immunity in federal court from impeachment than state law ever intended. In that circumstance, it is respectfully submitted that a New York youthful offender adjudication ought to be treated as a conviction for purposes of federal law. *Cf. United States* v. *Turner,* 497 F.2d 406, 407-08 (10th Cir. 1974).

Moreover, even assuming the general inadmissibility of a youthful offender adjudication for impeachment purposes, Benigno's sweeping and misleading assertion that he had never been convicted of a crime surely opened the door to questioning about his youthful offender offense.* It is well established that questions about prior criminal activity not ordinarily permitted on cross-examination to impeach credibility generally are proper to contradict a specific false factual assertion gratuitously elicited on a defendant's direct

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* Benigno maintains that he was technically correct in denying that he had ever been convicted, because a youthful offender adjudication is not a conviction. See CPL § 720.35. Apparently, under the Code of Criminal Procedure, superseded in 1971, a youthful offender was not "convicted" before his adjudication. Code of Crim. P. § 913g. Under present New York law, however, a youthful offender adjudication consists of a youthful offender finding and a youthful offender sentence. CPL § 720.10. Both the finding and sentence follow a *conviction* for the crime charged. CPL § 720.10(1). Only after the conviction and a determination that the offender is an eligible youth does the statute direct that the conviction be deemed vacated. CPL § 720.20(3).

examination. *United States* v. *Keilly*, 445 F.2d 1285, 1288-89 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972); *United States* v. *Glasser, supra*, 443 F.2d at 1002-03; *United States* v. *Nagelberg*, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); see *United States* v. *Colletti*, 245 F.2d 781, 782 (2d Cir.), *cert. denied*, 355 U.S. 874 (1957). Inquiries concerning Benigno's youthful offender status were, as Judge Gagliardi found (Tr. 483), justified where a youthful sinner had been deliberately and misleadingly portrayed a saint. *United States ex rel. Rohrlich* v. *Fay*, 240 F. Supp. 848, 850 (S.D.N.Y. 1965) (Weinfeld, *J.*). Indeed, the fact that defense counsel was under the misapprehension that he had asked Benigno on direct whether he was a youhtful offender and that Benigno admitted he was (Tr. 403) sheds light on the misleading impression that was created by defense counsel not inquiring into this area after Benigno denied ever having been convicted of a crime.

It remains only to determine whether if the questions put were improper, Benigno may have suffered prejudice, because, despite Benigno's consistent denials, the prosecutor's questions may have led the jury to conclude that he had in fact been convicted of grand larceny or burglary. First, the trial judge instructed the jury that inferences could not be drawn from the fact a question had been asked. (Tr. 577). Second, and more importantly, whatever prejudice Benigno might have suffered was surely cured by defense counsel's argument in summation that:

> "My client told you he has never been convicted of a crime. The United States Attorney has never introduced the slightest bit of paper to the contrary." (Tr. 522).

Finally, it is respectfully submitted that the Government's case against Benigno was a very strong one and that his conviction was not affected by these questions. See *United States* v. *Rivera*, 496 F.2d 952, 954 (2d Cir. 1974).

POINT VI

Benigno suffered no prejudice as a result of inquiries about his post-arrest statements.

Benigno claims that he suffered prejudice when inquiries were made of him during cross-examination concerning certain post-arrest statements. He argues that, before any reference to the statements was made, he should have been afforded a hearing on the question of the voluntariness of the statements.

During a pre-trial suppression hearing concerning quantities of marijuana found in the apartment where Benigno was arrested in the late afternoon of October 17th, Benigno testified that, shortly after his arrest, he had been physically abused by the agents. (Transcript of hearing, January 9, 1975, at 26). Specifically, he claimed that the arresting officers had put thumb pressure on his eyes, run their hands through his hair and pushed him until he passed out. Agent Hall, one of the arresting officers, denied having witnessed any such abuse, although he testified that he had seen Benigno appear to faint shortly after his arrest. (Transcript of hearing, at 25; Tr. 462-63, 466). The day after his arrest and after having been lodged overnight in the Federal Detention Facility at West Street, Benigno was interviewed in the United States Attorney's Office by an Assistant United States Attorney. There appears to be no dispute that prior to this interview Benigno was advised of his constitutional rights (see Benigno's Brief at 12-13), although there is some question about whether Benigno indicated at the interview that he would furnish information limited to his background. (See Tr. 396-98). At trial, defense counsel claimed that, before Benigno's post-arrest statements could be used to impeach his testimony at trial, there should have been a hearing on the issue of voluntariness

because of the alleged physical abuse Benigno suffered the day before. (Tr. 393).*

Benigno is correct in his assertion that, if there is a showing that post-arrest statements are involuntary because of physical coercion, a hearing should be held before such statements are used to impeach the defendant's live testimony. The concern that a coerced statement might be unreliable should be explored before the statements are placed before the jury. *Cf. Harris* v. *New York,* 401 U.S. 222, 224 (1971).

However, it is difficult to see how Benigno could be said to have suffered any prejudice in this case as a result of the failure to hold a hearing. First, even assuming the truthfulness of Benigno's assertion that he had been subjected to physical abuse on the day of his arrest, it is difficult to see how this could have affected the reliability and voluntariness of a statement—almost entirely exculpatory **—given the next day, after being advised of his constitutional rights, in the United States Attorney's Office.***

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* Defense counsel initially expressed his willingness to allow Benigno to be asked questions relating to the background information he had supplied at this interview (Tr. 387-89), but withdrew this offer when it became clear that the inquiries related to Benigno's use of cocaine.

** The only incriminating portion of the statement was that Benigno used cocaine. He denied giving Canniff anything on October 17, 1973 (GX 3526).

*** Indeed, given the allegation in support of the claim of involuntariness simply that the defendant had been caused to faint by the agents at the time of his arrest the day before he made his admissions (Tr. 398), and the absence of any claim that the defendant was suffering from any discomfort or apprehension as a result at the time he was interviewed the next day, we respectfully submit that Benigno's showing was insufficient to warrant a hearing, particularly since at such a hearing Benigno would have had the burden of proof. *Government of the Virgin Islands* v. *Gereau,* 502 F.2d 914, 922 (3d Cir. 1974).

Second, the questioning of Benigno by use of these statements failed to develop any inconsistencies in his testimony. Benigno testified that he had never used cocaine. He was then asked, on cross-examination, whether he recalled being asked when interviewed by the Assistant United States Attorney if he used cocaine and whether he recalled being asked if he was an addict. He answered that he did not recall being *asked* either question. No further inquiry was made or permitted. (Tr. 413-15). Benigno's testimony that he did not recall being asked these questions was not inconsistent with his prior testimony that he had not used cocaine. It is respectfully submitted that he could not therefore have suffered any prejudice as a result of these questions.

Similarly, after denying that he had seen Bryan Canniff and John Aponte together in apartment 4E on October 17, 1973, Benigno was asked whether he told the Assistant who interviewed him that Canniff and Aponte had been in the apartment together. He replied first that he did not recall whether he had or had not made such a statement and then stated that he did not recall having seen the two men together. (Tr. 443-47). These questions and answers caused Benigno no prejudice. *Cf. United States* v. *Polizzi*, 500 F.2d 856, 911 (9th Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3403 (January 20, 1975). For this line of inquiry failed to develop any inconsistency in Benigno's testimony, since Benigno continued to maintain that he had not seen the two men together and did not admit that he had previously said anything to the contrary. Because the Government failed to develop any inconsistency in Benigno's testimony, this line of inquiry was of no value to the Government. The Government's theory throughout the case was that there was no John Aponte. In the absence of any contradiction in Benigno's testimony, it made no difference whether Benigno admitted seeing Canniff and Aponte together on October 17th.

But even assuming *arguendo* that the cross-examination by use of the statements may have had some effect on the

verdict, it is not necessary to reverse Benigno's conviction. If a hearing is required, the case should instead be remanded to provide the District Court an opportunity to conduct one. See *United States* v. *Parizo*, 495 F.2d 1406, 1407 (2d Cir. 1974); *United States* v. *Goss*, 484 F.2d 434 (6th Cir. 1973); *United States* v. *Bynum*, 475 F.2d 832 (2d Cir. 1973); *United States* v. *Salinas*, 439 F.2d 376, 380 (5th Cir. 1971); *Cf. Jackson* v. *Denno*, 378 U.S. 368, 395-96 (1964). For if the statements were voluntary, there was surely no error in asking questions about them and a new trial would be unnecessary.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John D. Gordan III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of June, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelopes addressed:

Michael Young, Esq.
Federal Defender Services Unite
509 United States Courthouse
Foley Square
New York, New York 10007

and

Theodore Krieger, Esq.
401 Broadway
New York, NY. 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

20th day of June, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977